91 950

Supreme Court, U.S.
FILED
DEC 4 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONARD KOMEN, Trustee in Bankruptcy
for Morris A. Shenker,

Petitioner,

vs.

LORAN W. ROBBINS, EARL L. JENNINGS, JR., MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, R. V. PULLIAM, ROBERT E. SCHLIEVE, THOMAS F. O'MALLEY, as Trustee of the Central States Pension Fund, and LYNN MARTIN, Secretary of Labor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SELNER, GLASER, KOMEN,
BERGER & GALGANSKI, P.C.

STANLEY E. GOLDSTEIN
7700 Bonhomme Ave., #700
Clayton, Missouri 63105
(314) 721-7272

Attorney for Petitioner

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

(1) Whether the Circuit Court of Appeals for the Ninth Circuit erred in failing to find that the District Court abused its discretion in dismissing with prejudice Petitioner's Complaint for failure to prosecute where Petitioner, a newly appointed Trustee in Bankruptcy, had been substituted as Party Plaintiff to the Complaint only three months previously, where extensive discovery had been completed, where Petitioner had requested a trial setting five weeks before the dismissal and where the Court had neither issued, imposed nor even considered less severe sanctions before dismissing the action.

(2) Whether a Federal Court can obviate the intent and purposes of the Bankruptcy Code by dismissing the claim of a Trustee in Bankruptcy newly-appointed without allowing the Trustee a reasonable time to prepare and bring the claim to trial on its merits.

NAMES OF PARTIES

Pursuant to Supreme Court Rule 14 the following is a list of parties to *Morris A. Shenker v. Loran Robbins, et al.*, District Court Case No. CV-80-185-RDF, Ninth Circuit Case No. 90-15670:

1. Petitioner, Leonard Komen, Trustee, Morris A. Shenker Bankruptcy Estate.

The Complaint was styled originally in the name of Morris A. Shenker (Shenker) individually in the United States District Court of Nevada. The action subsequently became an asset of his Bankruptcy Estate which was commenced upon the filing of his Voluntary Petition under Chapter 11 of the United States Bankruptcy Code on January 3, 1984. Said Bankruptcy case was converted to a Chapter 7 case on May 23, 1989 and Shenker immediately appealed the conversion, ultimately winning a stay of the conversion. Shenker, the bankrupt, died August 8, 1989. Petitioner was appointed Operating Trustee on September 7, 1989. No Probate Estate has been opened for Shenker and he has no personal representative. Petitioner was substituted as Party Plaintiff on January 2, 1990.

2. Respondents Loran W. Robbins, Earl L. Jennings, Jr., Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, R. V. Pulliam, Robert E. Schlieve, Thomas F. O'Malley are or were Trustees of the Central States Southeast and Southwest Areas Pension Fund and are parties only in their capacity as Trustees and not in their individual capacities.

3. Respondent, Lynn Martin, Secretary of Labor, was an intervenor-defendant granted leave to intervene by the United States District of Nevada.

TABLE OF CONTENTS

	Page
Questions Presented	i
Names of Parties	ii
Table of Authorities	v
Statutes Involved in this Case	vii
Official and Unofficial Reports of Lower Court Opinions	1
Statement of Jurisdictional Grounds	2
Statement of the Case	2
Reasons for Granting the Petition	6
I. This Court should determine allowable limits within which the trial court may exercise discretion to dismiss complaints without a determination on the merits. Each Circuit and many District Courts by local rule set standards mandating the analysis to be conducted by the Court before ordering a dismissal for failure to prosecute. The Ninth Circuit ignored its own line of precedents and the precedents of each and every other circuit by allowing the instant dismissal to stand.	6
II. A dismissal for failure of a newly appointed Trustee in a Bankruptcy to prosecute after the Trustee has requested a trial setting undermines the purpose of the Bankruptcy Code in preserving assets of the Estate for the benefit of its creditors.	6

Conclusion 21

Appendix 22

TABLE OF AUTHORITIES

Page

Cases:

Ace Novelty Co., Inc. v. Gooding Amusement Co., Inc., 664 F.2d 761 (9th Cir. 1981) 13

Ash v. Cvetkov, 739 F.2d 493 (9th Cir. 1984) 12

Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198 (1956) 7

Boudwin v. Graystone Insurance Co., Ltd., 756 F.2d 399 (5th Cir. 1985) 15,20

Enlace Mercantil Internacional, Inc. v. Senior Industries, 848 F.2d 315 (1st Cir. 1988) 16

Fong Foo v. United States, 369 U.S. 141 (1962) 7

Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986) .. 8,14

Hillig v. Commissioner of Internal Revenue, 916 F.2d 171 (4th Cir. 1990) 15,20

Jackson v. Schoemehl, 788 F.2d 1296 (8th Cir. 1986) 16

Kokoszka v. Belford, 417 U.S. 642 (1974) 19

Lowe v. City of East Chicago, Indiana, 897 F.2d 272 (7th Cir. 1990) 15-16

MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988) 19

Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987) 8,14

Marks v. San Francisco Real Estate Board, 627 F.2d 947 (9th Cir. 1980) 12

Mir v. Fosburg, 706 F.2d 916 (9th Cir. 1983) 12

McKelvey v. A. T. & T. Technologies, Inc., 789 F.2d 1518 (11th Cir. 1986) 16

Nealey v. Transportacion Maritima Mexicana, 662 F.2d 1275 (9th Cir. 1980) 8,11,12

Patterson v. Township of Grand Blanc, 760 F.2d 686 (6th Cir. 1985) 16

Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984) 14,20

Scarborough v. Eubanks, 747 F.2d 871 (3d Cir. 1984) .. 14,20

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) 7,9,10,14

Stanley v. Alcock, 310 F.2d 17 (5th Cir. 1962) 16,17

Straton v. New, 283 U.S. 318 (1931) 19

Tamini v. M/V Jewon, 808 F.2d 798 (2d Cir. 1987)..... 16

Toth v. TransWorld Airlines, Inc., 862 F.2d 1381 (9th Cir. 1988) 8

United States for the Use of Wiltec Guam v. Kahaluu Construction Co., 857 F.2d 600 (9th Cir. 1988)..... 8,11,12

STATUTES:

Federal Rule of Civil Procedure 41(b) 4,7,10

Title 11 of the United States Code § 541(a)..... 18

STATUTES INVOLVED

Federal Rule of Civil Procedure 41(b):

> Rule 41. Dismissal of Actions
>
> . . . (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to joint a party under Rule 19, operates as an adjudication upon the merits.

11 U.S.C. § 541(a)

> 11 U.S.C. § 541. Property of the estate
>
> (a) The commencement of a case under section 301, 302, or 303 of this title (11 USCS §§ 301, 302, or 303) creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the

debtor in property as of the commencement of the case.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LEONARD KOMEN, Trustee in Bankruptcy
for Morris A. Shenker,

Petitioner,

vs.

LORAN W. ROBBINS, EARL L. JENNINGS, JR., MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD MCDOUGALL, R. V. PULLIAM, ROBERT E. SCHLIEVE, THOMAS F. O'MALLEY, as Trustee of the Central States Pension Fund, and LYNN MARTIN, Secretary of Labor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OFFICIAL AND UNOFFICIAL REPORTS OF LOWER COURT OPINIONS

Order and Opinion of the United States District Court of Nevada entered April 10, 1990 is attached as Exhibit 1. There is no published official Opinion.

Panel Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, not for publication, entered July 5, 1991, affirming the United States District Court of Nevada's April 10, 1990 Order is attached hereto as Exhibit 2.

Panel Opinion of the United States Court of Appeals for the Ninth Circuit, not for publication, entered September 10, 1991, denying Petitioner's Petition for Rehearing and rejecting Petitioner's Suggestion for Rehearing En Banc. Said Opinion is attached hereto as Exhibit 3.

JURISDICTIONAL STATEMENT

On April 10, 1991 Petitioner's Complaint in the United States District Court of Nevada was dismissed with prejudice for failure to prosecute. Petitioner timely filed his Notice of Appeal from such Order to the United States Court of Appeals for the Ninth Circuit.

The Order of the District Court was affirmed by Order of the U.S. Court of Appeals for the Ninth Circuit dated July 5, 1991. Petitioner timely filed a Petition for Rehearing and Suggestions of the Appropriateness for a Rehearing En Banc. The Petition for Rehearing was denied and the Suggestion was rejected September 10, 1991. This Court's jurisdiction for Writ of Certiorari is invoked pursuant to Title 28, United States Code §1254(1).

STATEMENT OF THE CASE

On June 12, 1980 Morris A. Shenker ("Shenker"), now deceased, filed a Complaint in the United States District Court of Nevada to recover from Respondent Central States Southeast and Southwest Areas Pension Fund ("the Fund") $50,000,000.00 as the reasonable value of services rendered to, and funds advanced for, the Fund. The jurisdiction of the District Court was obtained pursuant to 28 U.S.C §1332 since none of the defendants were residents of the same state as Shenker.

An adjudication of the merits of Shenker's claim for the value of services rendered and funds advanced has not yet been made.

Thereafter, on March 6, 1981, Respondent Secretary of Labor sought and obtained leave to intervene in the case.

Extensive discovery was conducted by all parties and bifurcation of the trial was ordered to permit trial of the dispositive issues contained in Respondents' affirmative defenses prior to the trial on liability.

Pre-trial conference settings for January 21, 1983, March 21, 1983, April 29, 1983, June 15, 1983, July 16, 1983, and July 29, 1983 were vacated by Order of the District Court to permit continued discovery and resolution of pending Motions.

The Court ordered a trial date of December 6, 1983. On November 25, 1983 this setting was "vacated and continued to May 1, 1984." On January 3, 1984 Shenker filed a Voluntary Petition and was adjudicated a Bankrupt under Chapter 11 of Title 11 of the United States Code making this case an asset of the Estate and a potential source of recovery for Shenker's creditors pursuant to 11 U.S.C. §541(a). On April 5, 1984 Shenker filed a Suggestion of Bankruptcy with the Nevada District Court and on April 9, 1984, the May 1, 1984 trial setting was vacated by the Court due to such suggestion.

On May 1, 1986 Defendant's Motion for Separate Trial was granted and a trial for determination of Defendant's affirmative defenses was set for October 6, 1986. However, on September 4, 1986 the Court entered a minute Order on its own motion vacating the October 6, 186 trial setting, to be reset at another date convenient for the Court and the parties. No other trial settings are to be found in the Court's file. There is no evidence in the record that Petitioner ever requested a continuance or vacation of a trial setting.

Petitioner was appointed a Trustee in Bankruptcy for Shenker on May 23, 1990 when the Bankruptcy Court ordered this Estate converted from a Chapter 11 Reorganization to a Chapter 7 Liquidation Case. Attorneys for Shenker immediately contested the conversion and took their appeal to the District Court.

The District Court entered an Order on August 28, 1989 staying the conversion of the Estate and Petitioner's appointment pending the determination of Shenker's Appeal and Petitioner was stripped of authority to take any action on behalf of the Estate.[1] The Bankruptcy Judge responded by appointing Petitioner Operating Trustee of the continuing Chapter 11 Bankruptcy.

On October 26, 1989 Respondents filed a Motion to Dismiss this case with prejudice in its entirety for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). At this time Petitioner was concerning himself with gaining familiarity with the nature, extent, and location of the Estate's various assets.[2]

Morris A. Shenker died August 8, 1989 and his son, M. Arthur Shenker, Jr., without notifying or obtaining authorization from either Petitioner or the Bankruptcy Court, retained the services of a moving company to move the entire contents of Shenker's St. Louis home, including some 5,000 pounds of business files

---

[1] From the time of his appointment May 23, 1989 Petitioner's tenure as Trustee was fraught with obstacles in the marshaling and administration of assets of the Estate. First, Shenker appealed the Court order converting the Bankruptcy Estate and also obtained a Stay of the Order appointing Petitioner as Trustee pending Appeal. Additionally, Shenker's attorneys and former law associates refused to turn over pertinent documents and records to the Trustee asserting that turning over the documents and records to Petitioner could vitiate the attorney-client privilege.

[2] The assets of the Estate included interests in a number of limited partnerships scattered from the Jersey Islands to New York to California, oil and gas leases, copyrights, deeds of trust on California real estate, hundreds of thousands of shares of Dunes Hotels & Casinos, Inc. stock and miscellaneous assets stored in storage facilities in San Diego, Las Vegas and St. Louis.

Petitioner was persistently thwarted in his efforts to obtain possession of documents and records essential to his administration by the former law associates of Shenker who asserted the attorney-client privilege to avoid turning such documents over to Petitioner.

and documents, to an unknown destination. At that point Petitioner had not located the files pertaining to this case and believed that they may have been located among the transported files. Petitioner was forced to file a turnover action against Shenker's son, the moving companies, and various other individuals in order to obtain possession of the files and documents.

Petitioner apprised the District Court and Respondents of his administrative problems and filed a Reply to Respondents' Motion to Dismiss. Respondents, with consent of Petitioner, then sought and received three extensions for filing their replication.

Petitioner's Motion for Substitution of Party was granted January 2, 1990.

On January 9, 1990 the Trustee filed an Application for Turnover against Shenker's former associates seeking to obtain possession of all documents and records in their possession which was granted by the Bankruptcy Court.

On March 7, 1990, Petitioner filed a Second Reply Memorandum in Opposition to Defendant's Motion for Dismissal of Action advising the Court of his efforts to obtain the documents necessary to pursue this case. This Memorandum requested that the Court set a trial date, announcing that Petitioner would be ready. See Exhibit 6.

On April 10, 1990 Judge Roger Foley, United States District Judge, District of Nevada, entered an Order dismissing the action with prejudice for lack of prosecution. See Exhibit 1. Petitioner timely filed his Notice of Appeal to the Ninth Circuit.

On July 5, 1991 a three judge panel affirmed the District Court's dismissal (see Exhibit 2) whereupon Petitioner filed a Petition for Rehearing and Suggestion of the Appropriateness of a Rehearing En Banc. The Petition for Rehearing was denied and the Suggestion for Rehearing En Banc rejected on September 10, 1991. See Exhibit 3. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

Petitioner urges that a Writ of Certiorari should be granted for the following special and important reasons:

1. This Court should determine allowable limits within which the trial court may exercise discretion to dismiss complaints without a determination on the merits. Each Circuit and many District Courts by local rule set standards mandating the analysis to be conducted by a Court before ordering a dismissal for failure to prosecute. The Ninth Circuit ignored its own line of precedents and the precedents of each and every other circuit by allowing the instant dismissal to stand.

2. A dismissal for failure of a newly appointed Trustee in a Bankruptcy to prosecute after the Trustee has requested a trial setting undermines the purpose of the Bankruptcy Code in preserving assets of the Estate for the benefit of its creditors.

ARGUMENT

When a Federal Court's application of the Federal Rules of Civil Procedure goes far afield from the usual, approved application of the Rules, this Court will exercise its supervisory powers to ensure the correct, consensual and equitable application of the Federal Rules of Civil Procedure. The Supreme Court has granted certiorari to determine the propriety of a dismissal with prejudice for failure to comply with a Court order pursuant to the Rules. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197 (1958). In *Societe Internationale, etc.* this Court stated that "because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari." *Id.* at 203.

Certiorari will be granted to "consider a question of importance in the administration of justice in the federal courts." *Fong Foo v. United States,* 369 U.S. 141, 142 (1962). Furthermore, this Court has granted certiorari where a Court of Appeals makes a doubtful application of its enunciation of federal procedures. *Bernhardt v. Polygraphic Company of America,* 350 U.S. 198, 200 (1956).

I. In Approving of the District Court's Exercise of Discretion in Dismissing the Claims of Petitioner the Ninth Circuit Failed to Apply the Tests Established by its Own Precedents or to Examine the Criteria Applied by Each and Every Other Circuit Before a Dismissal of a Case with Prejudice for Failure to Prosecute.

Petitioner requests certiorari not only because the Ninth Circuit is in conflict with other circuits, but because the Ninth Circuit has so egregiously refused to follow its own interpretation of Rule 41(b) in this case.

Prior Ninth Circuit cases have employed a five part test, with slight variations, in determining whether a dismissal with prejudice for failure to prosecute pursuant to Fed. R. Civ. P. 41(b) is appropriate. Its latest formulation of the test is set forth in *Toth v. TransWorld Airlines, Inc.*, 862 F.2d 1381 (9th Cir. 1988) in the following language:

> Five factors must be considered before imposing the sanction of dismissal:
>
> (1) the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its docket; (3) the risk of prejudice to the defendant; (4) the public policy favoring disposition of cases on the merits; and (5) the availability of less drastic sanctions.

Id. at 1385. See also *United States for Use of Wiltec Guam v. Kahaluu Construction Co.*, 857 F.2d 600, 603 (9th Cir. 1988), *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987), *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986) and *Nealey v. Transportacion Maritima Mexicana*, 622 F.2d 1275, 1279 (9th Cir. 1980).

Both the District Court and the Court of Appeals failed specifically to address these five factors or in any way to conduct the analysis which is proper for purposes of determining whether a case should be dismissed for failure to prosecute. Where a District Court has failed to set forth expressly its rationale under the five prong test several Ninth Circuit opinions mandate that the appellate court "must review the record independently to determine whether the order of dismissal was an abuse of discretion." *Malone*, 833 F.2d at 133. See also *Toth*, 862 F.2d at 1385 and *U.S. for the Use of Wiltec Guam*, 857 F.2d at 603.

In this case, the District Court made no findings of fact, but rather merely catalogued the motions and oppositions and replies to said motions and dismissed the case with prejudice. See

Exhibit 1. Such summary dispatch failed to address any of the criteria set forth in relevant Ninth Circuit cases or to offer any independent rationale for the dismissal. It is particularly noteworthy that this Order of Dismissal was entered only five weeks after Petitioner filed his Reply Memorandum which advised the Court of his efforts and intentions to pursue the case and which, most importantly, requested a trial setting.

The Opinion rendered by the three judge Panel hereinbelow was as bereft of analysis as the District Court's Order. The Panel's Opinion indicates that an independent review was not conducted.

The Panel, in its review, concentrated on only the first two of the five prongs set forth above. The Panel concentrated solely on the two macrocosmic, systemic aspects of the test, i.e. those aspects concerning the public's interest in expeditious resolution of litigation and the courts' need to mange its docket. See Exhibit 2.

The other countervailing criteria which include the more microcosmic aspects of litigation, that is to say, the rights of a particular plaintiff to have his case decided on its merits versus the rights of the defendant to avoid the risk of prejudice inherent in any delay, are ignored as though they do not form the very heart of our principles of justice. This Court in *Societe Internationale etc.*, acknowledges the importance that the American legal tradition places on disposing of a case on its merits and ruled that:

> the provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

Id. at 209.

In that case, this Court reversed the Circuit Court's Order affirming the District Court's dismissal with prejudice to Plaintiff's Complaint pursuant to Rule 41(b) for Plaintiff's failure to comply with a discovery order.[3] The Plaintiff there had failed to expeditiously comply because such compliance may have subjected it to criminal sanctions. *Societe Internationale etc.* went on to hold:

> petitioner's failure to proceed with the case to the satisfaction of the lower court was due to inability fostered neither by petitioner's own conduct nor by circumstances within its control.

Id. at 211.

Finally, this Court concluded that in view of

> the serious constitutional questions we have noted, we think that rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that *failure to comply has been due to inability, and not willfulness, bad faith, or any fault of petitioner.*

Id. at 212 (emphasis added).

The Courts of Appeals in both *Societe Internationale, etc.* and in this case blindly and mechanically applied the Federal Rules of Civil Procedure so as to deprive Petitioners of an opportunity to have their cases adjudicated on the merits. The Ninth Circuit hereinbelow failed to acknowledge the Constitutional implications of the dismissal, completely discounted the traditional legal preference for disposing of a case on its merits, and blatantly disregarded the record showing that any delays in

---

[3] The Supreme Court however found that the dismissal as only possible on the basis of Fed. R. Civ. P. 37.

bringing the case to trial were not the result of Petitioner's conduct and were in fact completely beyond his control.

The Circuit Court neither examined the record for prejudice to the Respondents nor did the Respondents allege actual prejudice. In their Motion for Dismissal and Memoranda in support thereof, Respondents state only:

> the *presumption* of prejudice is reinforced here by the staggering complexity of events from the early and middle 1970's that, as the 106-page Pretrial Order illustrates, are the focus of this litigation . . .

See Exhibit 4 at page A-11. (Emphasis added.)

Respondents make no further reference to prejudice in their Memoranda. At no point do Respondents state that they have been actually prejudiced by the passage of time or by the fading of memory or by anything else. In fact, Respondents allude to the absence of prejudice and demonstrate their readiness for trial in their Reply Brief where they state "If the Dismissal Motion is denied, there is no known reason why a date for this separate trial of affirmative defenses should not be scheduled at this time." See Exhibit 5 at page A-17.

In Nealy, the Ninth Circuit stressed that "the pertinent question is not simply whether there has been *any*, but rather whether there has been *sufficient* delay or prejudice to justify a dismissal of the plaintiff's case." *Nealey*, 662 F.2d at 1280 (emphasis added). Thus, it is error to dismiss a case with prejudice where "appellees never suggested that actual prejudice had occurred; they relied solely on appellant's alleged failure to exercise due diligence and on the presumption of prejudice they claimed to result therefrom." *Id.* at 1283. The Court in *United States for the Use of Wiltec Guam* has held that "because there is no evidence of *actual* prejudice, the third factor [of the five prong test] does not support the sanction [of dismissal]." *United States for the Use of Wiltec Guam*, 857 F.2d at 604 (emphasis added). See also

Ash v. Cvetkov, 739 F.2d 493, 496 (9th Cir. 1984) and *Mir v. Fosburg*, 706 F.2d 916, 918 (9th Cir. 1983). The Court in *Mir*, states that:

> we have reviewed the record, the papers filed by the parties in the district court and the district court's order dismissing those complaints for failure to prosecute. We cannot find in these documents allegations of prejudice occasioned by delay during the relevant period sufficient to justify the drastic sanction of dismissal with prejudice.

Mir, 706 F.2d at 919.

Where Respondents themselves indicated that there was no reason not to schedule a trial, it becomes clearly an abuse of discretion for the Panel to concentrate mechanically on the passage of time in dismissing the case. This is particularly true where diligence and continued efforts to achieve a resolution on the merits has been exhibited by Petitioner, a new Party Plaintiff whose interest in pursuing the claims is qualitatively different from that of Shenker's. The Ninth Circuit itself has stated that "earlier lack of diligence is not grounds for dismissal when the plaintiff is currently displaying diligence." *Marks v. San Francisco Real Estate Board*, 627 F.2d 947, 948 (9th Cir. 1980). Furthermore, "where Plaintiff is presently prosecuting a claim with reasonable diligence, an action cannot be dismissed simply because at some earlier time Plaintiff failed to act with diligence." *Nealey*, 662 F.2d at 1284.

In this case, the lack of diligence complained of may be attributed only to Shenker.[4] Once Petitioner was appointed and

---

[4] In Shenker's defense, it must be noted that on August 4, 1983 the District Court set the case for trial on December 6, 1983 but that on November 25, 1983 the case was removed from the trial calendar. It is undeniable that Petitioner herein played no part in the case being removed from the trial docket.

(Footnote 4 continued on Page 13)

became aware of this case, his actions were continuous and devoted to pursuing the case as best he could. Indeed, it is difficult to comprehend what more Petitioner could have done given the veritable plethora of obstacles which beset him in his efforts.

When the Panel complained that "every document filed [by Petitioner] after the Motion to Dismiss appeared to rely upon the bankruptcy as an excuse to continue to stall," (see Exhibit 2) it completely ignored the fact that those problems set forth in Petitioner's memoranda were simply beyond Petitioner's control, that Petitioner was exercising his best efforts to overcome the obstacles and that, "Petitioner's failure to proceed with the case to the satisfaction of the lower court was due to inability

---

(Footnote 4 continued)

When the Opinion charges that "the District Court removed the case from the calendar. Mr. Shenker did nothing to move it toward trial," see Exhibit 2, it implies that Shenker was derelict in his duties in scheduling the trial. In *Ace Novelty Co. v. Gooding Amusement Co.*, 664 F.2d 761 (9th Cir. 1981), the Ninth Circuit stated:

> "Once ready for trial plaintiff is not obligated under the rules, as we read them, to take any further affirmative action. Instead, the rules place the obligation upon the clerk to fix the date for trial."

Id. at 763. Shenker had been ready for trial, having conducted extensive discovery and complied with the District Court's Order to submit a pretrial order on August 4, 1983. The Panel wrongfully placed the onus for calendaring the case for trial upon Shenker and/or Petitioner.

When the Opinion states "Mr. Shenker died in 1989 without having taken any steps to move the case towards trial,"(see Exhibit 2), it is incorrect. He had conducted discovery, complied with the the Court's Orders, and participated in the preparation of a lengthy and comprehensive pretrial order. There is no evidence in the record that he was not amenable or that he was unprepared to go to trail at the October 6, 1986 setting or that he was responsible for the continuance of that setting. The Panel's Opinion nevertheless implicitly faults Shenker for said continuance.

fostered neither by Petitioner's own conduct nor by circumstances within [his] control." *Societe Internationale etc.*, 357 U.S. at 211.

Finally, neither the District Court nor the Ninth Circuit applied or even considered sanctions less severe than dismissal. A Rule 41(b) dismissal with prejudice is to be reserved only for particularly egregious cases where there is a clear record of delay or contumacious conduct by Petitioner. *Henderson*, 779 F.2d at 1423. *Malone*, 833 F.2d at 130.

While the other circuits have not adopted the particular five point test previously implemented by the Ninth Circuit, each other circuit applies a relatively objective test and agrees that dismissal is to be employed only in egregious cases where there a clear record of delay or contumacious conduct by Plaintiff and where there has been a determination that less severe sanctions would prove inadequate.

For example, the Third Circuit balances the following six factors in determining whether a dismissal is proper:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3rd Cir. 1984). See also *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984);

The Fourth Circuit dictates that Courts engage in a four point analysis:

> before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion, and (4) the effectiveness of sanctions less drastic than dismissal.

Hillig v. Commissioner of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990). *Hillig* further ruled:

> Dismissal under this rule is reserved for 'only the most flagrant case, where the party's noncompliance represents bad faith and callous disregard for the authority of the district court and the Rules'.

Id. at 174-175. The Fifth Circuit has ruled that:

> Dismissals with prejudice are 'reserved for the most egregious of cases, usually cases where the requisite factors of clear delay and ineffective lesser sanctions are bolstered by the presence of at least one of the aggravating factors.' . . . Those aggravating factors include (1) delay resulting from intentional conduct, (2) delay caused by the plaintiff personally and (3) delay causing prejudice to the defendant.

Boudwin v. Graystone Insurance Co., Ltd., 756 F.2d 399, 401 (5th Cir. 1985) (citations omitted).

While the other circuits do not adhere to a multi-pronged analysis those Circuits do make clear that:

> The District Court should consider less severe sanctions than dismissal for a party's noncompliance with Court Orders or failure to prosecute his or her claim expeditiously, unless 'there exists a clear record of delay or contumacious conduct or when less drastic sanctions have proven ineffective.'

Lowe v. City of East Chicago, Indiana, 897 F.2d 272, 274 (7th Cir. 1990). See also *Patterson v. Township of Grand Blanc,* 760 F.2d 686 (6th Cir. 1985).

Likewise, the Eighth Circuit in *Jackson v. Schoemehl,* 788 F.2d 1296 (8th Cir. 1986) has ruled that "Each case must be viewed on its own," but also stated that "a clear pattern of delay or contumacious conduct . . . should precede such a drastic remedy." *Id.* at 1299 (citations omitted).

The Eleventh Circuit is in accord. It ruled in *McKelvey v. A. T. & T. Technologies, Inc.,* 789 F.2d 1518 (11th Cir. 1986) that "such dismissal is a sanction of last resort, applicable only in extreme circumstances, and generally proper only where less drastic sanctions are unavailable." *Id.* at 1520.

The First Circuit in *Enlace Mercantil Internacional v. Senior Industries,* 848 F.2d 315 (1st Cir. 1988) has:

> gradually developed two independent limitations on the use of dismissal as a penalty for delay. First dismissal is an option only when the plaintiff's misconduct is 'extreme'. Second dismissal should be employed only after the district court has determined 'that none of the lesser sanctions available to it would truly be appropriate'

Id. at 317 (footnotes and citations omitted).

The Second Circuit agrees that "dismissal of an action with prejudice is a drastic remedy which should be applied only in extreme circumstances: *Tamini v. M/V Jewon,* 308 F.2d 978, 980 (2d Cir. 1987).

Finally, the Fifth Circuit has rendered one decision very much on point with the facts of this case. In *Stanley v. Alcock,* 310 F.2d 17 (5th Cir. 1962) the district court dismissed a case where the attorney for Plaintiff/Trustee failed to comply with an order of the Court to attend a hearing on a Motion to Strike because the

Trustee had died the day before the hearing date. The Court there held that:

> It is clear that a new trustee should have a reasonable time after appointment and substitution to acquaint himself with the issues of the case and that it ought not to be dismissed without taking that situation into account. . . . Plaintiff's attorney was, during that entire period, beset by many difficulties in producing his proof, most of which had to be obtained from his adversaries. This fact, plus the change of trustees, furnished extenuating circumstances which lead us to the conclusion that the Court below ought not to have exercised its discretion so as to dismiss the action for want of prosecution.

Id. at 20. It is error and abuse of discretion not to permit a newly appointed Trustee sufficient time to prepare for the prosecution of a case.

Since the Ninth Circuit did not follow its own precedents in reviewing the propriety of the District Court's dismissal, since neither court considered less severe sanctions and since the Courts completely ignored the extenuating circumstances involved in this case, this Court should grant certiorari.

II. Certiorari Should Also Be Granted Because the Ruling of This Case Attacks the Integrity and Purposes of the United States Bankruptcy Code by Estopping Creditors from an Opportunity to Preserve the Assets of the Bankruptcy Estate.

The Opinion of the Panel of the Ninth Circuit indicates that the court below did not fully comprehend the position of Petitioner as Trustee of the assets of the Bankruptcy Estate for the benefit of its creditors. The Court states "A trustee in bankruptcy, *as personal representative of the decedent,* appeals from an order dismissing the action for want of prosecution." See Exhibit 2

(emphasis added.) This language erroneously implies that Petitioner represents the decedent's Estate. To the contrary Petitioner, as Trustee, represents over 100 unsecured creditors of the Shenker Bankruptcy Estate, which is one of the largest personal bankruptcy cases ever filed in Missouri, having claims aggregating in excess of $100,000,000.00. This lawsuit was a potentially large asset of that Estate and therefore a potentially sizable source of recovery for creditors. The District Court's dismissal and the Court of Appeal's affirmation of such dismissal abruptly and summarily deprived scores of creditors of an opportunity for recovery.

While the Opinion acknowledges that "the court substituted Leonard Komen, trustee in bankruptcy for the decedent as party plaintiff", see Exhibit 2, it mischaracterizes the relationship between Shenker and Petitioner. This is more than a mere error in semantics since it demonstrates the Court's refusal to accept and acknowledge the adversarial relationship existing between Petitioner and Shenker. It instead speaks in terms of Petitioner being an alter ego of Shenker with analogous interests and motivation. This is not the case.

When Shenker filed this lawsuit in 1980 it was his own personal asset. He prosecuted the suit in his personal capacity. However, when Shenker filed bankruptcy January 3, 1984 this suit became an asset of the Bankruptcy Estate pursuant to 11 U.S.C. §541(a) which provides in pertinent part:

> The commencement of a case under §301, 302, or 303 of this titles creates an estates. Such estate is comprised of all of the following property wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interest of the debtor in the property as of the commencement of the case.

11 U.S.C. §541(a)(1).

This lawsuit became a source to which his creditors could look for satisfaction of their claims. Had the case been adjudicated on its merits and judgment entered in favor of Petitioner, it would have been Shenker's creditors, not Shenker's Probate Estate, who would have benefited from such judgment. In affirming the dismissal of this case, the Ninth Circuit indifferently extinguished an asset of the Estate, undermining the purposes of the bankruptcy scheme.

The very foundations of the Bankruptcy Code are bottomed on the proposition that a Trustee and the Bankruptcy Court must of necessity preserve assets of the Bankruptcy Estate for the benefit of creditors. *Kokoszka v. Belford,* 417 U.S. 642, 651 (1974). See also *Straton v. New,* 51 U.S. 318, 320-321 (1931) and *MacArthur v. Johns-Manville Corp.,* 837 F.2d 89, 91 (2d Cir. 1988). In the instant case the Bankruptcy Court finally appointed Petitioner Operating Trustee on September 7, 1989 and immediately Petitioner took steps to gain possession of the documents and files critical to his administration of this enormously complicated Bankruptcy.

On December 21, 1989, Petitioner filed his Motion to be substituted as Plaintiff in this case citing his appointment as Trustee in Bankruptcy. He was substituted on January 2, 1990.

He moved forward quickly, requesting a trial setting on March 7, 1991. In the Reply Memorandum in Opposition to the Motion to Dismiss, Petitioner advised the Court as follows:

> The Trustee does intend to fully prosecute this case and agrees with the defendants that there is no reason why a date should not be set for trial. However, the Trustee requests that the trail date be set sufficiently in advance so as to permit the Trustee time to take possession of the files and adequately prepare for trial.

See Exhibit 6 at p. A-20.

The Ninth Circuit's failure to recognize that there had been a very important change in the Party Plaintiff explains its action in penalizing scores of creditors who have valid claims against the Estate and who are completely innocent of any alleged contumacious conduct.

As the Third, Fourth and Fifth Circuits have pointed out, the fact that a Plaintiff is not *personally* responsible for delays or disobeying Court Orders weighs heavily against the dismissal of an action since such dismissal unjustly penalizes an innocent party. See *Poulis*, infra *Scarborough*, infra *Hillig*, infra and *Boudwin*, infra.

Had the District Court acted while Shenker was alive and was still Debtor-in-Possession and Party Plaintiff its actions could have been understood though misguided and incorrect. But the precipitous and poorly reasoned denial of justice to the Petitioner by both the District Court and Ninth Circuit demands the attention of the Supreme Court. This Court should grant Certiorari because the ruling of the Ninth Circuit, denying its own precepts and the principles of every other circuit have the effect not only of quashing the rights of a party plaintiff but also of defeating the purposes of the Bankruptcy Code.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner prays that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

SELNER, GLASER, KOMEN,
BERGER & GALGANSKI, P.C.

STANLEY E. GOLDSTEIN
7700 Bonhomme Ave., Suite 700
Clayton, Missouri 63105
(314) 721-7272

Attorney for Petitioner

APPENDIX

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CASE NO. LV-80-185-RDF

MORRIS SHENKER,
Plaintiff,

vs.

LORAN W. ROBBINS, ROBERT E. SCHLIEVE, EARL L. JENNINGS, JR., MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, as TRUSTEES OF THE CENTRAL STATES, SOUTHWEST AND SOUTHWEST AREAS PENSION FUND,
Defendants,

and

RAYMOND J. DONOVAN,
Secretary of Labor,
Intervenor-Defendant.

ORDER

Defendant's Motion for Dismissal of Action in its Entirety with Prejudice, for Lack of Prosecution having been filed on October 26, 1989, being Docket No. 128; Intervenor Defendant's Motion for Dismissal of Plaintiff Morris A. Shenker's Action having been filed on November 8, 1989, being Docket No. 129; Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss having been filed November 13, 1989, being Docket No. 130; Plaintiff's Supplement to Memorandum in Opposition to Defendant's Motion to Dismiss having been filed on December 26, 1989, being Docket No. 133; Defendant's Reply Memorandum in Support of Motion for Dismissal of Action, with 1990,

being Docket No. 144; the Trustee's Reply Memorandum in Opposition to Defendants' Memorandum in Support of Motion for Dismissal of Action having been filed on March 7, 1990, being Docket No. 146, the Court having been fully advised in the premises, and good cause appearing therefore, it is hereby

ORDERED that Defendant's Motion for Dismissal of Action in its Entirety is hereby granted. It is

FURTHER ORDERED that Defendants' Motion for Dismissal of Action in its Entirety, with Prejudice, for Lack of Prosecution, is hereby granted.

DATED this 10th day of April, 1990.

/s/ Roger D. Foley
UNITED STATES
DISTRICT JUDGE

EXHIBIT 2

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-15670
D.C. No. CV-80-185-RDF

MORRIS A. SHENKER,
Plaintiff-Appellant,

and

LEONARD KOMEN,
Real Party in Interest-Appellant,

v.

LORAN W. ROBBINS; EARL L. JENNINGS, JR.; MARION M. WINSTEAD; HAROLD J. YATES; ROBERT J. BAKER; HOWARD McDOUGALL; R. V. PULLIAM, SR.; ROBERT E. SCHLIEVE; THOMAS F. O'MALLEY, as TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Defendants-Appellees

and

RAYMOND J. DONOVAN, Secretary of Labor,
Intervenor-Defendant.

MEMORANDUM*

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding

Submitted May 13, 1991**
San Francisco, California

Before: CHAMBERS, GOODWIN and CANBY, Circuit Judges.

A trustee in bankruptcy, as personal representatives of the decedent, appeals from an order dismissing the action for want of prosecution. We affirm. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

Morris A. Shenker commenced this action in 1980, seeking indemnity from trustees of a pension fund for money which he claimed he had been required to pay as a result of various transactions between himself and others involved in pension funds.

A pretrial order was filed on August 4, 1983, and the case was set for trial on December 6, 1983. On November 25, 1983, the case was removed from the trial calendar and a new date of May 1, 1984, was set for trial. Mr. Shenker meanwhile suffered substantial judgments in other litigation which apparently caused him to file for voluntary bankruptcy in St. Louis, Missouri.

An attorney representing Mr. Shenker suggested to the district court that until the bankruptcy court granted relief from the automatic stay, this action should be removed from the trial calendar. The district court removed the case from the calendar. Mr. Shenker did nothing to move it toward trial. In March of

---

** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

1986, the district court scheduled a status conference, to which counsel for Mr. Shenker reported that "plaintiff intends to review this matter, to apply to the Bankruptcy Court for instructions and will keep this court advised."

Mr. Shenker died in 1989 without having taken any steps to move the case toward trial. On October 26, 1989, the pension fund defendants moved to dismiss under Fed. R. Civ. P. 41(b) for want of prosecution, and a few days later the Secretary of Labor moved to dismiss.

On January 2, 1990, the court substituted Leonard Komen, trustee in bankruptcy, for the decedent as a party plaintiff. Thereafter, after studying briefs filed by the parties on the appropriateness of dismissal for want of prosecution, the court dismissed the action.

We have examined the files and find nothing since 1986 that would indicate any intention on the part of Mr. Shenker or his subsequent representatives to proceed with this litigation. No request appears to have been made in the Eastern District of Missouri for a bankruptcy court order granting relief from the stay so that this litigation could proceed if anyone had a good faith belief that it would benefit the bankruptcy estate to proceed. On the contrary, every document filed after the motion to dismiss appeared to rely upon the bankruptcy as an excuse to continue to stall.

The record reveals no reason for this court to conclude that the trial court abused its discretion in dismissing a moribund case. *See Link*, 370 U.S. at 629. Indeed, nothing appears in any of the papers filed in connection with this appeal to indicate that, if the case were restored to the docket, any serious effort would be made to proceed to trial.

AFFIRMED.

EXHIBIT 3

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-15670
D.C. No. CV-80-185-RDF

MORRIS A. SHENKER,
Plaintiff-Appellant,

and

LEONARD KOMEN,
Real Party in Interest-Appellant,

v.

LORAN W. ROBBINS; EARL L. JENNINGS, JR.; MARION M. WINSTEAD; HAROLD J. YATES, ROBERT J. BAKER; HOWARD McDOUGALL; R. V. PULLIAM, SR.; ROBERT E. SCHLIEVE; THOMAS F. O'MALLEY, as TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Defendants-Appellees

and

RAYMOND J. DONOVAN, Secretary of Labor,
Intervenor-Defendant.

ORDER

Before: CHAMBERS, GOODWIN, and CANBY,
Circuit Judges.

The panel has noted unanimously to deny the petition for rehearing. Judge Canby has voted to reject the suggestion for rehearing en banc, and Judges Chambers and Goodwin so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judges has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

EXHIBIT 4

RENE C. ARCENEAUX, ESQ.
BECKLEY, SINGLETON, DE LANOY,
JEMISON & LIST, Chartered
411 East Bonneville Avenue
Las Vegas, Nevada 89101
(702) 385-3373

JAMES L. COGHLAN
Suite 1500
250 South Wacker Driver
Chicago, Illinois 60606
(312) 906-8299

WILLIAM J. NELLIS
Secretary to the Board
Central States, Southeast and
Southwest Areas Pension Fund
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631
(312) 693-5300

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-80-185-RDF

MORRIS A. SHENKER,

Plaintiff,

LORAN W. ROBBINS, ROBERT E. SCHLIEVE, EARL R. JENNINGS, JR., MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, as TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendants,

and

ELIZABETH DOLE, Secretary of Labor,
Intervenor-Defendant.

DEFENDANTS' MOTION FOR DISMISSAL OF ACTION IN ITS ENTIRETY, WITH PREJUDICE, FOR LACK OF PROSECUTION

Defendants Loran W. Robbins, Robert E. Schlieve, Earl L. Jennings, Jr., Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall and R. V. Pulliam, Sr., pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, respectfully move for an order dismissing the above-entitled action in its entirety, with prejudice, for lack of prosecution, and in support of this Motion cite the following circumstances:

1. This action was filed on June 12, 1980, and has been pending for more than nine years.

2. The 106-page Pretrial Order was signed by the Court on July 29, 1983, and filed on August 4, 1983.

3. The most recent order in this action was dated September 3, 1986 and filed September 4, 1986, and provided as follows:

"IT IS ORDERED that the trial date of OCTOBER 6, 1986 is hereby vacated to be re-set at a later date convenient for the Court and the parties in this action."

4. Plaintiff, Morris A. Shenker, reportedly died on August 8, 1989.

5. Plaintiff, Morris A. Shenker, reportedly commenced personal bankruptcy proceedings during 1984, and these proceedings are reportedly still pending, entitled *In re: Morris A. Shenker, Debtor*, Case No. 84-00001-BKC-JJB in the United States Bankruptcy Court for the Eastern District of Missouri.

This Motion is made and based on the foregoing, all pleadings and papers on file herein, together with the Points and Authorities attached hereto.

DATED this 25th day of October, 1989.

BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, Chartered

By: /s/ RENE C. ARCENEAUX, ESQ.
411 East Bonneville Avenue
Las Vegas, NV 89101
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE COURT SHOULD EXERCISE ITS AUTHORITY TO DISMISS THIS ACTION, WITH PREJUDICE, FOR LACK OF PROSECUTION.

The Court is vested with inherent authority to dismiss this action for lack of prosecution. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). *See also, In re Osinga*, 91 B.R. 893, 894 (9th Cir. BAP 1988). The factors to be weighed by the Court in deciding whether to order a dismissal for lack of prosecution are:

"(1) the public's interest to expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants' (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions."

Henderson, 779 F.2d at 1423. *See also, Osinga*, 91 B.R. at 894.

It is a well established rule in this Circuit that "[i]t is the plaintiff's duty to expedite its case to its final determination . . .."

Osinga, 91 B.R. at 896. And, after a passage of years, "[i]n light of the fact that witnesses move away and their memories fade, injury to the defendants is rightfully presumed." *Osinga*, 91 B.R. at 895. That presumption of prejudice is reinforced here by the staggering complexity of the events from the early and middle 1970's that, as the 106-page Pretrial Order illustrates, are the focus of this litigation. *See, M & R Inv. Co., Inc. v. Fitzsimmons*, 484 F. Supp. 1041 (D. Nev. 1980), *aff'd* 685 F.2d 283 (9th Cir. 1982).

This litigation has been pending, in several chapters, for a very long time. It is respectfully suggested that the time has come to close the book, and that a dismissal with prejudice will be a fair, reasonable and effective disposition.

Respectfully submitted,

BECKLEY, SINGLETON, DELANOY,
JEMISON & LIST, Chartered
By: /s/ RENE C. ARCENEAUX, ESQ.
411 East Bonneville Avenue
Las Vegas, NV 89101
Attorneys for Defendants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 26 day of October, 1989, a copy of the foregoing DEFENDANTS' MOTION FOR DISMISSAL OF ACTION IN ITS ENTIRELY, WITH PREJUDICE, FOR LACK OF PROSECUTION, was duly served on the following parties, by depositing a copy of same in the U. S. mail, postpaid, addressed to them at their last known address, as follows:

Bruce F. Rinaldi
William Zuckerman
Office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
200 Constitution Avenue, N.W.
Washington, D.C. 20013

Richard J. Pocker
United States Attorney
Suite 700
330 Las Vegas Blvd., South
Las Vegas, Nevada 89101

Bernard J. Mellman
Cordell Siegel
Susman, Schermer, Rimmel & Shifrin
Tenth Floor, Aragon Place
7711 Carondelet Avenue
St. Louis, Missouri 63105

John L. Boeger
Suite 200
408 Olive Street
St. Louis, Missouri 63102

Andrew F. Puzder
The Stolar Partnership
7th Floor
911 Washington Avenue
St. Louis, Missouri 63101

Jones, Jones, Close & Brown
Suite 700
Valley Bank Plaza
300 South Fourth Street
Las Vegas, NV 89101-6026

Thomas J. Duffey
Duffey Law office, S.C.
Suite 302
933 North Mayfair Road
P.O. Box 26453
Milwaukee, Wisconsin 53266

/s/ Susan Schlatt

An Employee of BECKLEY, SINGLETON, DE LANOY, EMISON & LIST, Chartered

EXHIBIT 5

RENE C. ARCENEAUX
BECKLEY, SINGLETON, DE LANOY,
JEMISON & LIST
411 East Bonneville Avenue
Las Vegas, Nevada 89101
(702) 385-3373

JAMES L. COGHLAN
Suite 1500
250 South Wacker Drive
Chicago, Illinois 60606
(312) 906-8299

WILLIAM J. Nellis
Secretary to the Board
Central States, Southeast and
Southwest Areas Pension Fund
8550 West Bryn Mawr Avenue
Chicago, Illinois 60631
(312) 693-5300

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-80-185-RDF

MORRIS A. SHENKER, by LEONARD KOMEN,
Trustee,
Plaintiff,

v.

LORAN W. ROBBINS, ROBERT E. SCHLIEVE, EARL R. JENNINGS, JR., MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL,

THOMAS F. O'MALLEY, and R. V. PULLIAM, SR., as TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendants,

and

ELIZABETH DOLE, Secretary of LABOR,

Intervenor-Defendant.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR DISMISSAL OF ACTION, WITH PREJUDICE, FOR LACK OF PROSECUTION

Defendants Loran W. Robbins, Robert E. Schlieve, Earl L. Jennings, Jr., Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall and R. V. Pulliam, Sr. present the following reply memorandum in support of their pending motion ("the Dismissal Motion") (filed October 26, 1989) for an order dismissing the above-entitled action in its entirety, with prejudice, for lack of prosecution.

In his response ("Plaintiff's Response") to the Dismissal Motion, Leonard Komen as Trustee, the recently substituted plaintiff in this action, does not even address the merits of the Dismissal Motion. Instead, Plaintiff's Response is confined to two procedural efforts to avoid the Dismissal Motion, summarized in this excerpt (*Id.*, pp. 3-4):

> "The interests of justice dictate: First, that the defendants' Motion be not merely denied but stricken as improper as violating the Automatic Stay provision of the Bankruptcy Code; second, that the Trustee be permitted a reasonable opportunity to acquire the case files and to review them to determine the merits of the case."

Neither of those points stands up under scrutiny.

Automatic Stay

Plaintiff's Respondent states "that the Automatic Stay Provision of the Bankruptcy Code 11 U.S.C. § 632 prohibits their motion *and prohibits this Court from granting that motion*" (*Id.*, p. 1; emphasis added). While such a *prohibition* would apply to any claims *against* the late Morris A. Shenker, the simple fact is that no such claims have been or are being asserted in this action. The legislation is unambiguous: the bankruptcy "petition . . . operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial . . . proceeding *against* the debtor. . . ." 11 U.S.C. § 362(a)(1) (emphasis added).

Judicial interpretations of that automatic stay provision undermine plaintiff's contention that it applies to this action. The prevailing wisdom is this analysis from *Assoc. of St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d 446, 448-449 (3d Cir. 1982) (emphasis in original):

> "Section 362 by its terms only stays proceedings *against* the debtor. The statute does not address actions brought *by* the debtor which would inure to the benefit of the bankruptcy estate.
>
> ". . . . whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs."

That inherent and unambiguous limitation upon the automatic stay provision has been applied in a variety of circumstances. *See Price & Pierce Intern. v. Spicers Intern. Paper*, 50 B.R. 25, 26 (S.D.N.Y. 1985) ("the right to pursue an interpleader action is not affected by the fact that one of the claimants has filed a petition in bankruptcy"); *Trans-Carribean Lines v. Tracor Marine, Inc.*, 49 B.R. 360, 362 (S.D. Fla. 1985) ("Section 362 does

not stay the independent prosectuion of a counterclaim by a party in reorganization. [Citation omitted.] If *prosectuion* of a counterclaim [or a crossclaim] is not barred by Section 362, then *dismissal* of that counterclaim [or crossclaim] cannot be prohibited by that statute"); and *Jefferson Ward Stores, Inc. v. Doody Co.*, 48 B.R. 276, 279 (E.D. Pa. 1985) ("[b]ecause Doody's third-party complaint and the motions filed in connection with it are not proceedings against the debtor, the automatic stay did not apply", and the grant of summary judgment against the debtor, on the debtor's own claims, was an effective exercise of jurisdiction).

The automatic stay provision of 11 U.S.C. § 362(a)(1) is entirely inapplicable to this action and the bold suggestion that this Court lacks jurisdiction to grant the Dismissal Motion is devoid of merit.

Continuance

Without presenting any affidavit or other evidence to the Court that would justify denial or deferral of the Dismissal Motion, plaintiff asks that he "be permitted a reasonable opportunity to acquire the case files and to review them to determine the merits of the case" (Plaintiff's Response, p. 4). Plaintiff's Response was served in this action more than three months ago, and plaintiff still offers no reason why the Dismissal Motion

should not be decided. Defendants respectfully suggest that, given the age and inertia of this action, the time for that decision is at hand.[1]

Respectfully submitted,

RENE C. ARCENEAUX
BECKLEY, SINGLETON,
DE LANOY, JEMISON & LIST
JAMES L. COCHLAN
WILLIAM J. NELLIS

By: _____
William J. Nellis

By: _____
RENE C. ARCENEAUX
411 E. Bonneville Ave.
Las Vegas, NV 89101

---

[1] An order by this Court entered in this action on May 5, 1986, states in part (p. 1):

> "The motion of the Secretary of Labor for an order that a separate trial be held with respect to the affirmative defenses of the statute of limitations, res adjudicata, and collateral estoppel pleaded by the Secretary and the defendants in their answers to plaintiff's complaint is granted. All remaining issues raised by the pleadings and the pretrial order, filed August 4, 1983, are postponed until after final determination of a separate trial of these issues."

If the Dismissal Motion is denied, there is no known reason why a date for this separate trial of affirmative defenses should not be scheduled at this time.

EXHIBIT 6

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Cause No. CV-S-80-185-RDF

MORRIS A. SHENKER, by
LEONARD KOMEN, Trustee,
Plaintiff,

vs.

LORAN W. ROBBINS, et al.,
Defendants,

and

ELIZABETH DOLE, Secretary of Labor,
Intervenor-Defendant.

REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL OF ACTION

The Trustee, in response to Defendants' Reply Memorandum in Support of their Motion for Dismissal of Action, seeks to apprise this Court of certain developments which have taken place in the Morris A. Shenker Bankruptcy in the Bankruptcy Court of the United States District Court of Missouri which have impacted favorably on the Trustee's ability to prosecute this action.

As the Trustee pointed out in Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, Leonard Komen was appointed Trustee in the Morris A. Shenker bankruptcy May 23, 1990, when that bankruptcy was converted from a Chapter 11 to a Chapter 7 case. Immediately upon his appointment, the debtor-in-possession filed a Notice of Appeal of the conversion order and the order appointing Leonard Komen as Trustee.

Because an appeal was pending, the debtor-in-possession and his attorney maintained possession of all of the Estate's property, including Mr. Shenker's legal files.

Nevertheless, since his appointment, the Trustee has sought to obtain all legal files of Morris A. Shenker to enable him to fully and properly administer all assets of the estate. The Trustee was hampered in his efforts to obtain the files by Mr. Shenker's children and several associates with whom Mr. Shenker had practiced law when those parties asserted the attorney-client privilege over the client files and refused to allow them to be turned over to the Trustee. Although it is clear that Mr. Shenker's case files relating to this case were not subject to the attorney-client privilege asserted by those parties, the realties of the situation nonetheless precluded the Trustee from obtaining possession of the files.

Mr. Shenker maintained two homes and two offices, a home and an office in Las Vegas, Nevada and a home and an office in St. Louis, Missouri. During the course of Mr. Shenker's bankruptcy, certain items, including files, were moved from the Las Vegas office and home into the St. Louis home and office and into storage facilities in Las Vegas, Nevada. Additionally, files stored at the St. Louis office were transferred to the St. Louis home or to storage facilities in St. Louis, Missouri. After the death of Mr. Shenker, all files and all items stored in his St. Louis residence were packed up and moved to storage facilities in Las Vegas, Nevada, without the Trustee's consent or knowledge. As a consequence of the shuffling of Mr. Shenker's business files and personal files between homes, offices and storage facilities in Las Vegas, Nevada and St. Louis, Missouri, the attorney for Mr. Shenker as debtor-in-possession was uncertain exactly where Mr. Shenker's files relating to this case were stored and was unwilling to conduct a comprehensive search of all storage facilities and was particularly unwilling to turn possession of all storage items over to the Trustee.

Since being served with the defendants' and the secretary's Motion to Dismiss, the Trustee and his attorneys have retained and designed local counsel to aid them in the prosecution of this matter. (Exhibit 1) The Trustee and his attorneys have also spoken with the attorney for the pension fund to explain their predicament and have met with the defendants' local counsel to discuss their progress in gaining the information necessary to try this case. Additionally, the Trustee has discussed this case with Mr. Andy Puzder who had been the attorney of record when the case was originally filed to review the merits of the case. The Trustee has taken affirmative steps to proceed in prosecuting this case and will be making even greater progress in the next few weeks.

The Trustee filed a Motion for Turnover of Property on January 9, 1990 (Exhibit 2), and the Motion was set for hearing February 21, 1990. At the hearing Judge Barta of the United States Bankruptcy Court, Eastern District of Missouri ordered that all of the debtor's property, including his legal files, be turned over to the Trustee (Exhibit 3). The Trustee is currently awaiting a copy of that signed Order and the keys to all storage facilities which are currently being held by the attorney for Mr. Shenker as debtor-in-possession. The Trustee, therefore, expects to gain access to all storage facilities and recover the case files that it needs to pursue prosecution of this matter. The Trustee does intend to fully prosecute this case and agrees with the defendants that where is no reason why a date should not be set for trial. However, the Trustee requests that the trial date be set sufficiently in advance so as to permit the Trustee time to take possession of the files and adequately prepare for trial.

The Trustee respectfully requests that this Court take into consideration the obstacles which have occasioned the Trustee's administration of this Estate and in so doing deny the Defendants' Motion for Dismissal and permit the plaintiff to go forward with his case.

SELNER, GLASER & KOMEN, P.C.

BY: /s/ COREY S. BERGER,
MBE#30323
9666 Olive Blvd., Suite 300
P.O. Box 32414
St. Louis, Missouri 63132-3088
(314) 997-4444
Attorneys for Trustee

CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the foregoing document has been mailed, first class, postage prepaid, this 5 day of March, 1990, to:

Bruce F. Rinaldi
William Zuckerman
Office of the Solicitor
Plan Benefits Security Division
Room N.-4611
P.O. Box 1914
200 Constitution Avenue, N.W.
Washington, D.C. 20013

Richard J. Pocker
United States Attorney
Suite 700
330 Las Vegas Blvd., South
Las Vegas, NV 89101

John L. Boeger
Suite 200
408 Live
St. Louis, Missouri 63102

Andrew F. Puzder
The Stolar Partnership
7th Floor
911 Washington Avenue
St. Louis, Missouri 63101

Thomas J. Duffey
Duffey Law Office, S.C.
Suite 302
933 North Mayfair Road
P.O. Box 26453
Milwaukee, Wisconsin 553266

Bernard J. Mellman
Cordell Siegel
Susman, Schermer, Rimmel & Shifrin
Tenth Floor, Aragon Place
7711 Carondelet Avenue
Clayton, Missouri 63105

John A. Hunt
Netzorg, Raleigh & Hunt
301 East Clark Avenue
Suite 700
Las Vegas, NV 89101

Mr. Rene Arceneaux, Esq.
Beckley, Singleton, DeLanoy, Jemison & List
411 East Bonneville Avenue
Las Vegas, NV 89101

/s/ COREY S. BERGER,
Attorney for Trustee

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-S-80-185-RDF

MORRIS A. SHENKER,
By Leonard Komen, Trustee,
Plaintiff,

vs.

LORAN W. ROBBINS, et al., and Dole,
Defendants.

DESIGNATION OF RESIDENT ATTORNEY ADMITTED TO THE BAR OF THIS COURT AND CONSENT THERETO.

The undersigned, attorney of record for (Plaintiff) (Defendant) Plaintiff, herein has submitted to the Court a "Verified Petition for Permission to Practice in this Case Only by Attorney Not Admitted to the Bar of this Court." Pursuant to the requirements of the Local Rules of Practice for this Court, (s)he believes it to be in the best interests of the client(s) to designate John A. Hunt, Attorney at Law, member of the State Bar of Nevada and previously admitted to practice before the above-entitled Court as associate resident counsel in this action. The address of said designated Nevada counsel is: 301 East Clark Ave., Suite 700, Las Vegas, NV 89101 (702) 386-4842 (Street, City, State, Zip Code and Telephone No.)

By this designation the undersigned attorneys and party(ies) agree that all documents and other papers issued out of this Court in the Above entitled case may be served on the designated resident admitted counsel. Further, said counsel shall be responsible for providing copies of the same to the unadmitted attorney(ies). Further, this designation constitutes agreement

and authorization by the undersigned for the designated resident admitted counsel to sign stipulations binding on all of us.

/s/ Corey S. Berger
Attorney at Law
Counsel for Plaintiff

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 84-00001-BKC-JJB

In Re:
MORRIS A. SHENKER,
Debtor.

TRUSTEE'S APPLICATION FOR ORDER TO TURN OVER LAW OFFICE FILES, AND MOTION FOR PROTECTIVE ORDER

Leonard Komen, the Trustee, requests this Court to issue its Order directed to Mr. Gerald A. Rimmel and Thomas Blumenthal, former counsel for the debtor-in-possession, to Mr. James F. Nangle and Ms. Cynthia N. Bitting, former special tax counsel for the debtor-in-possession, and to Mr. John Boeger, former employee of the debtor-in-possession, granting the Trustee access to and possession of all of Morris A. Shenker's law practice client files which he or they had in their possession or which are now in possession of former attorneys or agents for Morris A. Shenker.

The Trustee further requests that this Court order that disclosure of such information shall not be deemed to be a disclosure to a third party nor in any way vitiate the privileged status of that information as granted by law in an attorney-client relationship.

Finally, the Trustee requests an Order barring him from disclosing privileged information to third parties without further court order.

The Trustee requests this Order for the following reasons:

1. The debtor was engaged in the practice of law for over 40 years, including the period since January 3, 1984 as a debtor-in-possession.

2. In the course of his practice the debtor may have been presented with business opportunities, incurred debts, or created accounts receivable, all relevant to administration of this case and much of the pertinent information may no doubt be contained in or disclosed by his law office files.

3. The extent of the debtor's estate as is yet unknown, and in order to obtain all information necessary to marshal assets, the Trustee must have free and unfettered access to the debtor's client files so as to fully investigate the assets of the Estate.

4. Some of the information in the client's file may be protected by the attorney-client privilege granted by state statutes and the attorney Code of Professional Responsibility.

5. If the Trustee is granted access to the files, the files and the client confidences contained therein may be deemed to be disclosed to a third party notwithstanding the Trustee's position as an officer of the Court, and the files may therefore lose their privileged status. To insure that the interests of the debtor's prior clients are adequately protected, this Court should order that the Trustee's possession and review of the files shall not be deemed such a disclosure to a third party as would vitiate the privileged status of the files.

6. In order to assert the attorney-client privilege, a client must prove that he related the information at issue to the attorney (or an agent of the attorney) in possession of the information for the purpose of receiving legal advice. Consequently, once the client's files are in the Trustee's hands, the debtor's clients will have no opportunity to assert the privilege to prevent the Trustee from disclosing the information to third parties. Therefore, as a final protection to the debtor's clients, this Court should issue an Order barring the Trustee from disclosing any information he receives pursuant to this Order to third parties, unless further Order of this Court is requested.

7. The Trustee requests this Order so as to obviate and avoid any potential difficulties regarding the attorney-client privilege in his acquisition of information during his Administration of the Estate. Such an Order will allow the Trustee to obtain the information and will at the same time protect the interests of the Debtor's former clients.

/s/ LEONARD KOMEN,
Operating Trustee
9666 Olive Blvd., Suite 300
St. Louis, Missouri 63132-3088
(314) 997-444

CERTIFICATE OF SERVICE

Signature above is also certification that a true and correct copy of the foregoing document has either been mailed, first class, postage prepaid, or hand delivered, this 9th day of January, 1990, to: All persons listed on the most recent matrix of creditors and interested parties on file with the Court.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No.: 84-00001-BKC-JJB

In Re:
MORRIS A. SHENKER,
Debtor.

ORDER

At Saint Louis, in this District, this ___ day of February, 1990, the Trustee's Application for Order to Turn Over Law Office Files and Motion for Protective Order coming before the Court, it is hereby,

ORDERED, that the Trustee's Application for Order to Turn Over Law Office Files and Motion for Protective Order is hereby granted upon entry of this Order as follows:

1. James F. Nangle, Cynthia N. Bitting, Popkin & Stern, Thomas R. Blumenthal, and Susman Schermer Rimmel & Schifrin, are hereby directed to forthwith turn over and surrender to the Trustee all of Morris A. Shenker's law practice client files which are presently located in various storage facilities and/or under the control of said parties as former attorneys or agents of Morris A. Shenker.

2. James F. Nangle, Cynthia N. Bitting, and Popkin & Stern are hereby directed to forthwith turn over and surrender to the Trustee all documents, files, and file contents in their possession or control including attorneys work product relating to all pending and closed tax matters and legal representation of Morris A. Shenker or I.J.K. Nevada, Inc. in connection with claims of the Internal Revenue Service.

3. The Trustee is authorized to retain John Boeger, a former employee of Morris A. Shenker, for the purpose of assisting in identifying said files, with compensation of John Boeger subject to further application and approval of the Court.

4. The surrender of said files and Trustee's taking control of said files shall not be deemed to be such a disclosure to a third party as would violate any privileged status of said files under existing laws or rules of ethics.

5. The Trustee shall be prohibited from disclosing or using any privileged information obtained from such files without further order of this Court.

DATE: _____ _____

JAMES J. BARTA
United States Bankruptcy Judge